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ABSTRACT

Traditionally, local school boards have had the power to assign students to classes and to set standards for promotion and graduation; with this authority has gone the discretion to decide what role pupil testing will play in the local schools. Courts have been reluctant to interfere with school board decisions on methodology, of which they consider testing to be a part. They will intervene, however, when a constitutional right is affected by board policy or practice. They have done so consistently where racial or ethnic discrimination was involved in pupil testing. Children are given standarized tests on numerous occasions throughout their public school careers. In addition to standardized tests, teachers prepare and administer tests in various subjects. However, this paper is concerned primarily with standardized tests, since it is they that have been attacked in the courts. Each type of test that has been dealt with in court cases is treated here. Specifically, they are: group and individually administered intelligence, aptitude, and achievement tests. (Author/DEP)

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Pupil Testing: A Legal View[1]

by

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Pupil Testing: A Legal View

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I. Introduction

Traditionally, local school boards have had the power to assign students to classes and to set standards for promotion and graduation;[1] with this authority has gone the discretion to decide what role pupil testing will play in the local schools. Courts have been reluctant to interfere with school board decisions on methodology, of which they consider testing to be a part. They will intervene, however, when a constitutional right is affected by board policy or practice. They have done so consistently where racial or ethnic discrimination was involved in pupil testing.[2]

Although very few cases that in some way challenged pupil testing lack racial overtones,[3] the existing court decisions nevertheless circumscribe all schools in their use of testing to a significant degree. It is the purpose of this paper to spell out the court-imposed limitations on the various kinds of tests commonly used in the public schools.

II. The Legal Limits of Testing in the Public Schools

Children are given standardized tests on numerous occasions throughout their public school careers. The tests are generally categorized as aptitude or achievement tests.[4] Most of them are group tests, but a few are administered individually. In addition to standardized tests, teachers prepare and administer tests in particular subjects. This paper is concerned primarily with standardized tests, since it is they that have commonly been attacked in the courts. Each type of test that has been dealt with in court cases will be treated here, roughly in the order in which a child would tend to be exposed to it as he or she progressed through school.

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Individual I.Q. and Psychological Tests

Psychological tests, such as the Goodenough Draw-A-Man test, are frequently given as prerequisites to entrance into school at the kindergarten or first-grade level. Individually administered I.Q. tests, most notably the Stanford-Binet and the Wechsler Intelligence Scale for Children (WISC) are sometimes given when a child is registered for school, particularly when he or she is suspected to be mentally retarded. Both psychological and intelligence tests may be given later in a student's school career, commonly when a teacher finds some evidence that suggests mental retardation or emotional disturbance. The test scores may be used as the primary basis for excluding a child from school altogether or for assigning him or her to a special education class--either a class for the educable mentally retarded (hereafter EMR) or a class or school[5] for emotionally disturbed (ED) children.[6]

Exclusion from School: Two important cases were concerned primarily with the exclusion of children from school. Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (hereinafter PARC) dealt with children who were excluded under a Pennsylvania statute as "uneducable and untrainable."[7] Mills v. Board of Education of District of Columbia was broader in scope, concerning a number of categories of children who had been excluded from school, including mentally retarded and emotionally disturbed children.[8] As a result of these cases, school authorities in Pennsylvania and the District of Columbia can no longer deny an education to such children. Neither case examined any tests given to children prior to their exclusion, nor did the courts specify how tests should be used in the future.

[illegible]

[illegible] clearly, they cannot be used to exclude children. . . Indeed, both cases explicitly condemn the continued use of tests for placement of children in special education classes; however, they assure no safeguards to parents by giving parents a full panoply of procedural rights, including the right to examine the tests and other data on which the proposed placement is based, the right to a hearing to contest the proposed placement, and the right to present evidence from expert witnesses on tests, psychological, and educational evaluations. These provisions suggest that the school authorities' interpretation of test results, and within the validity of the particular tests used, are open to challenge and will be closely scrutinized by a hearing officer.[9]

Placement in EMR Classes: It is apparent from the foregoing analysis of PARC and Mills that these cases teach us the use of tests to place children in special education classes. The overlap between exclusion and placement cases is even more apparent in Lebanks v. Nyquist,[10] a Pennsylvania case in which the court ordered an order similar paralleling the PARC and Mills orders. In addition, the court imposed specific requirements in restricting the use of tests in one kind of placement. Under the Lebanks order, placement in classes for the mentally retarded cannot be made unless the I.Q.T., an instrument to be individually administered test, is 80 or below, child's cognitive behavior is abnormal, and the effects of the child's sociocultural background can found not to affect the rating.

Whereas in Lebanks, PARC and Mills, the plaintiff(s) class has been made up of children excluded from school altogether, a number of suits have been brought

by children who were in EMR classes at the behest of an ethnic assistance division. In Diana v. [illegible] State Board of Education,[2] the plaintiffs included Mexican-American children who had been placed in an EMR class on the basis of a [illegible]-point test score ranging from 68 to 72. The central fact in this case was the difference in the children's scores when they were presented in a bilingual psychological and protected to answer in English or Spanish. This points, on the average, 24 points. Others may also evidence that the children performed significantly better, by 20 or 22 points, on the nonverbal section of the WISC test than on the verbal section.[3] These facts were brought out in the complaint, as were facts concerning the methods by which the Plaintiff-Minors and WISC tests were standardized (on white Anglo-Americans) and concerning the disproportionate percentages of Hispanic students in EMR classes throughout California.

The case never went to trial. The parties stipulated that [illegible] testing of non-Anglo-American children for the purpose of special education placement was to utilize both the child's primary language and English. However, only tests or portions of tests not dependent on vocabulary, general information, and other verbal questions could be used. Expert psychologists were to develop and standardize an I.Q. test that would be appropriate for Mexican-American and other non-English-speaking [illegible].

Today not a significant effort on the part of individually administered I.Q. tests for EMR placement. In California, legislation to prevent such actions on test scores followed.[4] According to the new standards, scores must be substantiated through a complete evaluation of the child's [illegible] history, cultural background, and academic achievement. In Arizona, [illegible]

[illegible]

[illegible] Lau v. Nichols, 414 U.S. 563 (1974), a federal court ordered San Francisco to provide certain special education services to Chinese-speaking students who were not proficient in English. The Court held that the failure to provide such services violated Title VI of the Civil Rights Act of 1964, as amended.

Many thought that the practice of segregating Asian Americans in bilingual education classes (i.e. Asians, Hispanics, Native Americans, etc.) would be struck down in Keyes.[1] Instead, in the Denver case, the Court ruled that Asian Americans were not a minority group for purposes of the Equal Protection Clause of the Fourteenth Amendment. Thus, the Court held that Asian Americans could be segregated in bilingual education classes without violating the Constitution.

Keyes v. School District No. 1, 413 U.S. 189 (1973).

[illegible]

[illegible]

[illegible]

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Teacher and School Accountability: As individuals and citizens' groups have pressed the schools to justify their curricula and methodology, legislatures have turned to the use of standardized tests to ascertain how well students are performing in one school as compared with others throughout a given state. Laws requiring that such tests be given in certain grades have been passed in many states.[38] Teachers and administrators tend to oppose the use of scores on these tests as an evaluative device, arguing that many factors other than curricula and teacher performance are responsible for the scores. In New Jersey, the statewide teachers' association has sought to enjoin publication of test results.[39] The attempt has been unsuccessful thus far.

In Iowa, the employment of a teacher was terminated on the grounds that the low scholastic accomplishment of her students, as measured by the Iowa Tests of Basic Skills and the Iowa Tests of Educational Development, indicated her professional incompetence. In Scheelhaase v. Woodbury Central Community School District,[40] a federal district court held that the teacher had been denied due process of law, concluding that the reasons for termination must have a basis in fact and that the test scores of her students were not sufficient to determine her competence. However, this ruling was reversed by the Eighth Circuit Court of Appeals, which ordered the district court to dismiss the case on the grounds that no constitutional right was involved. The court held that it had no power over the administration of the internal affairs of the school district.

> ...Such matters as the competence of teachers, and the standards of its measurement are not, without more,

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> matters of constitutional dimension. They are peculiarly appropriate to state and local administration.[41]

The plaintiff in Scheelhaase did not allege that the defendant school board had used the test scores to discriminate against her on the basis of her race, ethnic background, or sex. But teachers have successfully challenged the racially discriminatory use of scores on tests that they were required to take.[42] Thus, members of minority groups who can prove that the test scores of their students are being used discriminatorily to terminate their employment are likely to be successful in court. Scheelhaase is probably not the last word from the judiciary on this use of achievement test scores.

An unusual approach to the use of pupil test scores for accountability purposes is represented by Serna v. Portales Municipal Schools.[43] In this class action, the Spanish-speaking plaintiffs used the scores from group I.Q. tests given to first graders and fifth graders in the district to show that they were being denied equal educational opportunity. The student population of one of the four elementary schools, Lindsey, was heavily Spanish-speaking, whereas students at the other three schools were primarily Anglo-American. Test scores of the fifth graders at Lindsey were, on the average, 8 to 13 percent lower than fifth grade scores from the other elementary schools. Of the first graders in the four schools, those at Lindsey scored lowest.

Although no specific figures were given, evidence based on reading tests and other achievement tests was also admitted. Expert testimony attributed the test score differentials to language problems. The court

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concluded that the test performance of the children at Lindsey was inadequate and that the school district was responsible. Holding that the "promulgation and institution of a program..which ignores the needs of...[Hispanic] students does constitute state action" and is a violation of the Fourteenth Amendment, the court directed the school administrators to reassess and enlarge the program for Spanish-speaking children in all of the schools.[44]

Nonstandardized Tests

Although tests prepared by teachers or institutions are used much more frequently than standardized tests at all grade levels, they have seldom been challenged in the courts. Recent attempts to do so have occurred where the use of such tests has an important impact on an individual's future and where discrimination on the basis of sex and/or race is alleged.

1. Admission to Specialized School

In Bray v. Lee,[45] the plaintiffs were seventh grade female students who had taken an examination for admission to the Boston Girls' Latin School. Because Boston's Boys' Latin School seated twice as many students as did the Girls' Latin School, fewer seventh grade places were available to girls than to boys. The school authorities solved this problem by creating a higher cutoff point in the test scores for girls than for boys. Only girls who scored 134 or more of 200 possible points were admitted, whereas boys who scored 120 were able to enter the Latin School. Without analyzing the constitutional right involved in any depth, a federal district court held that

> ...The use of separate and different standards to evaluate the examination results to determine the admissibility of boys

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> and girls to the Boston Latin Schools constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment, the plain effect of which is to prohibit prejudicial disparities before the law. This means prejudicial disparities between all citizens, including women or girls.[46]

A recent California case, Berkelman v. San Francisco Unified School District,[47] buttresses the decision in Bray v. Lee, although the use of test scores was not, at least directly, at issue. In Berkelman students were admitted to a specialized academic high school on the basis of their junior high school grade-point averages in four college preparatory subjects. (These averages must, of course, have been at least partially the result of numerous teacher-prepared tests.) In order to equalize the number of male and female students at the school, the district set a higher cutoff point for girls than for boys. The court held this practice to be a denial of equal protection to female students, since the district had not proved that "a balance of the sexes furthers the goal of better academic education."[48] Although the court rested its holding on the Fourteenth Amendment, it noted that the differential admission standards would have constituted an illegal discrimination under Title IX of the Education Amendments of 1972 (20 U.S.C. §1681) had they been applied in the admission of students to advanced courses within a single school. The court analyzed the Congressional intent behind the statute and found that it bore on the situation in this case.

The plaintiffs in Berkelman also alleged that use of grade-point averages for admission purposes discriminated against black, Spanish-speaking, and low-income students. In dealing with this issue, the court

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word reasoning similar to that in Hobson v. Hansen,[49] but concluded that the use of a specialized high school does not constitute "tracking." It pointed out that students not admitted to the specialized school were not denied "a quality education," since they could attend a comprehensive high school where college preparatory courses were available. Further,

> Unlike a "tracking" system in which the challenged classifications are "predictive" and isolate students of "less promising" ability, the classification here is based upon past achievement impartially measured.[50]

Issue could be taken with this conclusion; as Judge Wright's analysis in Hobson implied, achievement tests may, in fact, assess the same skills that aptitude tests evaluate and may, thus, not be as impartial as they seem. But the court in Berkelman did not look behind the grade-point averages to the tests on which they were based.

Graduation Requirements: Unlike Brau and Berkelman, a recent decision of the New Jersey Commissioner of Education involving sex discrimination does not rely on the Fourteenth Amendment. The petitioner in this case, Pitsihos v. Board of Education of South River[51] challenged the policy of a local school board in regard to the use of test scores in physical education classes. Under this policy, only female students were given written examinations in this subject, whereas male students were graded solely on the basis of their participation and attitude, and tests of their physical skills. The petitioner failed physical education in her senior year and thus was denied a diploma at graduation. After a hearing to determine the facts, the hearing examiner found that she would have passed if her grades on the written tests had not been averaged with her

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grades for participation, attitude, and physical skills.

The Commissioner held that the case was moot, since the student had subsequently been awarded a diploma after attending summer school. He nevertheless went on to state that the school board had acted inappropriately and beyond its authority in mandating written tests for female students only. According to the Commissioner, local boards of education can issue guidelines concerning assessment programs, but teachers have discretion to develop specific procedures for assessing the progress of pupils in their courses. Further, the Commissioner concluded that an assessment program created by a teacher is not per se discriminatory because it is used for students of one sex in one class and not for those of the opposite sex in another class. Unless it can be shown that such a testing program is an abuse of the teacher's discretion, the Commissioner will not intervene.

The Commissioner's decision may ultimately have little bearing on testing practices such as the one challenged in this case, since the use of separate classes for male and female students is no longer permitted under Title IX of the Education Amendments of 1972, as well as under a New Jersey statute.[53] And the conclusions regarding teachers' discretion over testing programs may simply reflect the reluctance of quasi-judicial administrative officers, as well as courts, to interfere with those they regard as having expertise in a specialized field. Further, since this case did not involve teacher discretion, the Commissioner may have considered it unnecessary to discuss the relationship between such discretion and the constitutional rights of students. When a teacher's exercise of discretion invades a constitutional right, however, courts are not likely to hesitate to intervene.

III. Conclusion

Most of the cases that have thus far dealt directly with legal testing have been limited by their facts to situations in which states were allegedly biased against, or have overtly acted to discriminatory factors against, minority groups and in females. Those cases have been so limited because they focused upon the strictest denial of equal educational opportunity. The courts analyzed in the texts to below have successfully utilized to cases that arise under the Equal Protection Clause of the Fourteenth Amendment. To prove a denial of Equal Protection, it is necessary to demonstrate that the State, as such agent, has intentionally discriminated against a class of persons. In the smallest case, the State can defend by showing that its differential treatment of the a rational basis; that is, that it reasonably furthers some legislative public interest. Using tests to identify students who acquisition of the benefit from special educational programs may, in many cases, be consistent with the rational-basis approach, and the courts will be reluctant to superimpose their views upon those of school administrators. However, a more stringent approach, imposing a far heavier burden of justification upon the State, has been used in cases involving alleged a "fundamental interest" or a "suspect classification." In such cases, the State must show that the differential treatment is supported by a a compelling need. The argument that the right to education is a "fundamental interest" has been rejected by the United States Supreme Court,[33] which has not ruled whether background are clearly "suspect classifications."

[illegible] and are also often likely candidates for that category. Thus, what courts take from contextual and evidence that pupil mobility has the effect of causing differentiated treatment along racial, ethnic, sex, and perhaps economic lines, that have tended to place a heavy burden of justification on the school authorities. The burden has ordinarily meant that all, and reliance on the pupil score for that purpose has been limited or barred.

Operation in those cases are, the [illegible] and [illegible] cases[28] point the way to a broader pursuit on pupil scoring. The plaintiffs in those cases claimed that they were denied due process of law. They did not base on [illegible] that also belonged to a class that was being discriminated against but only that the practices that complained of were irrational, and hence fundamentally unfair to them, and that they were being deprived of a [illegible] or property interest by the use of the tests.

The plaintiffs' evidence in [illegible] demonstrated that the assumption underlying the practice of excluding minority children from that classification that it could not benefit from educational opportunity, and that the exclusion placed them in [illegible] environments. The same conclusion applied in [illegible], but there the court stressed another consideration: the stigmatization of children who are assigned to special education classes. That factor was important in the holding that procedural due process must be afforded before pupils are placed in those classes. In [illegible] the Supreme Court's decision in [illegible][29] shows the [illegible] environmental and [illegible] [illegible] and [illegible] [illegible].

[illegible]

[illegible]

Footnotes

1. Hendricks and Hendricks, The Law of Publicity (Many citations).

2. The confusion actually in this area of legal analysis runs about proportionate to the degree of emphasis on social and economic considerations. Compare the outstanding decisions in Haelan v. Topps, 202 F.2d 866 (2d Cir. 1953), and Uhlaender v. Hendricks, 316 F. Supp. 1277 (N.D. Ill. 1970), aff'd on other grounds, 444 F.2d 1301 (7th Cir. 1971). Haelan, which is generally considered the leading case, held that a baseball player could grant an exclusive license to use his photograph in connection with the sale of chewing gum, even though the player had no objection to the use of his photograph. See also, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). Uhlaender, on the other hand, held that baseball players had no property right in their baseball records since the dissemination of baseball information was important to the general publication of baseball games. See also, Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969). Compare Palmer v. Schonhorn Enterprises, Inc., 96 N.J. Super. 72, 232 A.2d 458 (Law Div. 1967), with Pallos v. Segal, 34 Misc.2d 184, 229 N.Y.S.2d 462 (Sup. Ct. 1962), aff'd, 18 A.D.2d 1113, 239 N.Y.S.2d 1009 (1st Dept. 1963), and Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967).

3. Where artists are employed on the regular, continuous or intermittent basis, their artistic and intellectual efforts are usually in exchange for their employer's salary and thus the employer is the owner of the work and their contractual rights, if any, are limited.

4. Artists should not accept the standard assignment form presented to them and they should carefully study and negotiate their contracts. Public relationship agents, if the artist needs assistance in locating them, can provide invaluable help. In this regard, the services of these professionals, in the case of performing artists, like a manager in a group of musicians, is often necessary. Compare Hirsch v. Bloch, 256 F. Supp. 928 (N.D. Ill. 1966), with Bloom v. Hepburn, 265 F. 747 (2d Cir. 1920), cert. denied, 254 U.S. 643 (1920).

5. See Brown v. Ziegler, 256 F.2d 618 (9th Cir. 1958).

6. Artist must realize that what he owns is intangible property which cannot be a service like an author manuscript.

7. See U. Copr. Off., Bull. No. 40 (Rev. 1978). A separate notice must appear with each reproduction of an unpublished or published artwork that will be registered. A notice consists of the copyright symbol, the name of the copyright owner, and the year of first publication. See also, 37 C.F.R. 202.2(c)(1) and Bureau of Copyrights, U.S. Copyright Office, Circ. 40 (1978).